



Santa Clara Law Review

Volume 41 | Number 4

Article 4

1-1-2001

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Recommended Citation

Gerald F. Uelman, Symposium, *Handling Hot Potatoes: Judicial Review of California Initiatives After Senate v. Jones*, 41 SANTA CLARA L. REV. 999 (2001).

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HANDLING HOT POTATOES: JUDICIAL REVIEW OF CALIFORNIA INITIATIVES AFTER *SENATE v. JONES*

Gerald F. Uelmen*

I. INTRODUCTION

On December 13, 1999, in *Senate v. Jones*,¹ the California Supreme Court removed an initiative measure from the ballot because it did not comply with the constitutional requirement that an initiative measure embrace no more than one subject.² The "single subject" requirement had been a part of the California Constitution since 1948, and dozens of initiatives had been challenged in the California Supreme Court on the ground that they violated this requirement. Yet *Jones* was the first time the California Supreme Court had ever invalidated an initiative because it embraced more than one subject.

Meanwhile, the initiative process achieved total domination of the California political scene. Every discussion or debate of public policy, including California's current crisis over the shortage of electrical power, is haunted by the specter of an initiative to "settle" the debate. More often, initiatives create more questions than they resolve, and those questions then take another initiative to provide answers. The initiative has thus become a fourth branch of government, with its own industrial complex available to draft and qualify measures on a recurring basis. Like the carnivorous plant in the movie *Little Shop of Horrors*,³ the

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1. 21 Cal. 4th 1142 (1999).

2. CAL. CONST. art. II, § 8(d).

3. LITTLE SHOP OF HORRORS (Warner Bros. 1986).

initiative industry opens its mouth in anticipation of every election, says "feed me!," and then grows larger. Each time Californians go to the polls, they expect to encounter a dozen ballot propositions, to determine questions as basic as who should go to jail, who should be executed, who should pay taxes and how much they should pay, and who can marry whom. Initiative contests become the political battleground where trial lawyers shoot it out with insurance companies, prosecutors face off against criminal defense lawyers, the religious right confronts the gay rights movement, and environmentalists take on polluters.

In this setting, a decision like *Jones* might be likened to *Marbury v. Madison*.⁴ Chief Justice John Marshall's pronouncement that legislation which violated the Constitution could be struck down by the courts began two centuries of dialogue between the legislative and judicial branches. Today, legislatures are well aware that when they enact laws, they must keep one eye on the constitutional interpretations emanating from the courts. For too long, the California initiative industry has remained largely oblivious to the two most significant limitations on the power of the initiative contained in the California Constitution: the prohibition of constitutional revision by initiative, and the requirement that initiatives address a single subject. The decision in *Jones* merits careful study by those who draft and promote initiatives. It may be the harbinger of a new level of judicial scrutiny of their handiwork.

II. THE CROCODILES IN THE BATHTUB

As a legal matter, initiatives are entitled to no greater deference than any other legislative enactment. As former Chief Justice Warren Burger put it, "[T]he voters may no more violate the Constitution by enacting a ballot measure than a legislative body may do so by enacting legislation."⁵ But as a practical matter, elected judges considering a popular initiative must face the same voters who enacted it to keep their judicial seats. Former Justice Joseph Grodin of the California Supreme Court once described these cases as "hot potatoes," explaining, "It is one thing for a court to tell a

4. 5 U.S. (1 Cranch) 137 (1803).

5. *Citizens against Rent Control/Coalition for Fair Housing v. City of Berkeley*, 454 U.S. 290, 295 (1981).

legislature that a statute it has adopted is unconstitutional; to tell that to the people of a state who have indicated their direct support for the measure through the ballot is another."⁶ After an election, judges who strike down an initiative adopted by the voters face the accusation that they have flouted the "will of the people." Often, the promoters of the invalidated initiative will then train their sights on the judges themselves, mobilizing initiative supporters to challenge the retention of the judges who voted to strike the initiative down.

California has seen more than its share of supreme court retention election challenges fueled by frustrated initiative supporters. In 1966, shortly before newly appointed Chief Justice Roger Traynor appeared on the election ballot, he authored an opinion striking down Proposition 14, an initiative declaring that Californians had the right to discriminate on the basis of race in the sale of their property.⁷ Traynor was widely denounced by the press and politicians, and many newspaper editorials urged his rejection at the polls. He was retained by a vote of sixty-five percent in 1966, a smaller margin than any previous vote of affirmation received by a Justice of the California Supreme Court. Four years earlier, Traynor had received a retention vote of 89.7%. Similar low returns were posted by the justices who joined Traynor in the Proposition 14 opinion. Justice Paul Peek, for example, was retained by a sixty-two percent vote, even though he had been confirmed only two years before by an eighty-eight percent margin.⁸

In 1982, after voters adopted a wide-ranging criminal justice initiative in June (Proposition 8), much of the campaign rhetoric for the November supreme court retention elections was focused upon a case pending before the supreme court challenging the validity of the initiative. Four of the seven Justices were due to appear on the ballot that November: Justices Broussard, Kaus, Reynoso, and Richardson. (Chief Justice Bird and Justices Mosk and Newman were not on the ballot that year). Senatorial candidate Pete Wilson announced that he would personally

6. JOSEPH GRODIN, *IN PURSUIT OF JUSTICE* 105 (1989).

7. See *Mulkey v. Reitman*, 64 Cal. 2d 529 (1966), *aff'd*, 387 U.S. 369 (1967).

8. See Gerald F. Uelman, *Supreme Court Retention Elections in California*, 28 SANTA CLARA L. REV. 333, 341 (1988).

oppose any Justice who voted to strike down Proposition 8. A challenge to the initiative had been dismissed prior to its enactment in *Brosnahan v. Eu* [*Brosnahan I*],⁹ with a four to three majority concluding that review of the constitutional issues should await the June election. Two of the three dissenters, however, expressed the opinion that the measure violated the constitutional requirement that an initiative measure address a "single subject."¹⁰ Thus, there was widespread speculation that the court would invalidate the measure. On September 2, 1982, the court handed down *Brosnahan v. Brown* [*Brosnahan II*],¹¹ a four to three opinion upholding the initiative. Only Justice Broussard joined Chief Justice Bird and Justice Mosk in dissenting.

The majority opinion in *Brosnahan II*, authored by Justice Frank Richardson, reaffirmed the "reasonably germane" standard for compliance with the single subject requirement,¹² and roundly rejected a further requirement that the several provisions of a measure be "interdependent."¹³ In previously upholding Proposition 13, the revolutionary limitation on property tax rates and restrictions on local taxing authority enacted in 1978, the court had noted that the various tax provisions were "interdependent" and "interlocking."¹⁴ *Brosnahan II* makes it clear, however, that such interdependence is not a constitutional prerequisite. All that is necessary is that a general subject or common concern unite all of the parts. The court found that common theme in the measure's promotion of the rights of actual or potential crime victims, which even embraced a declaration that public school students and staff have an "inalienable right" to attend campuses which are "safe, secure and peaceful."¹⁵ Justice Richardson also

9. 31 Cal. 3d 1 (1982).

10. See *id.* at 5 (Mosk, J., concurring and dissenting); *id.* at 14 (Bird, C.J., dissenting). The "single subject" requirement is contained in article II, section 8(d) of the California Constitution.

11. 32 Cal. 3d 236 (1982).

12. An initiative measure does not violate the single subject requirement if all of its parts are reasonably germane to each other. See *Fair Political Practices Comm'n v. Superior Court*, 25 Cal. 3d 33, 38-39 (1979); *Perry v. Jordan*, 34 Cal. 2d 87, 90-92 (1949).

13. See *Brosnahan*, 32 Cal. 3d at 248-49.

14. See *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, 22 Cal. 3d 208, 231 (1978).

15. CAL. CONST. art. I, § 28(c).

dismissed a claim that the initiative was an example of "logrolling," whereby certain groupings of voters, each constituting a minority, are combined to produce an aggregate majority by combining disparate provisions, none of which would command a majority in isolation. He stated, "It is highly unlikely that Proposition 8 was the product of any logrolling whatever, because it contains no 'unnatural combination' of provisions on unrelated subjects which might suggest an inordinate vote-getting scheme on behalf of the proponents."¹⁶ Despite the decision upholding the controversial initiative, the Republican Party State Central Committee endorsed the "nonconfirmation" of Justices Kaus and Reynoso, as well as Justice Broussard, in the November election.¹⁷ The following November, these three Justices were narrowly confirmed, by margins of 56.3% for Broussard, 57% for Kaus, and 52.4% for Reynoso. Justice Richardson, on the other hand, was confirmed by a comfortable margin of 76.2%.¹⁸ Subsequently, Justice Otto Kaus candidly reflected that he remained uncertain in his own mind whether campaign rhetoric had a subliminal impact on his decision in the case.¹⁹ He used a marvelous metaphor to describe the dilemma of deciding controversial cases while facing reelection, saying that it was like finding a crocodile in your bathtub when you go in to shave in the morning. You know it is there, and even though you try not to think about it, it is hard to think about much else while you are shaving.²⁰ Although many commentators attributed the decision in *Brosnahan II* to the overheated political context in which it was decided, Professor Daniel Lowenstein published a strong defense of the decision "to demonstrate that the majority ruling was legally sound and therefore need not be regarded as an instance of political cowardice."²¹ Defending the "reasonably germane" test as clear enough to deal with "wildly diverse" initiatives, he nonetheless proposed a "gloss"

16. *Brosnahan*, 32 Cal. 3d at 251.

17. See *Unger v. Superior Court*, 37 Cal. 3d 612 (1985).

18. See L.A. DAILY J., Nov. 4, 1982, § 1, at 1.

19. See L.A. TIMES, Sept. 28, 1986, § 1, at 3; Grodin, *Judicial Elections: The California Experience*, JUDICATURE, Apr.-May 1987, at 365, 368.

20. See Gerald F. Uelman, *Otto Kaus and the Crocodile*, 30 LOY. L.A. L. REV. 971 (1997).

21. Daniel H. Lowenstein, *California Initiatives and the Single Subject Rule*, 30 UCLA L. REV. 936, 938 n.13 (1983).

on the standard, calling upon the courts to inquire into the "public understanding" of the relationship among the various parts of a complex initiative. Rather than looking to the text of the initiative alone, the courts could look to evidence such as published media or opinion polls to see if the public perceived some prior relationship among the parts. Thus, he concludes, an initiative that might fail the "reasonably germane" test at one point in time, might pass it at another. "For example, a measure dealing with air and water pollution, conservation of gasoline, and disposal of toxic wastes might have violated the single subject rule in the 1950s, but should be upheld today in light of increased environmental consciousness."²²

Brosnahan I became the leading California case on the availability of pre-election review of initiatives, and *Brosnahan II* became a leading California case on the meaning of the single subject limitation. This pair of crocodiles still resides in our bathtub, but *Jones* may have allayed their capacity to disturb a morning shave.

III. SENATE V. JONES

Jones presented a pre-election challenge to Proposition 24, an initiative measure entitled the "Let the Voters Decide Act of 2000." The measure would have amended the California Constitution to reduce the salaries of legislators and require voter approval of any increases, as well as require the supreme court to adopt plans for the decennial reapportionment of legislative and congressional districts, and submit its plans to the voters for approval at the next general election.

The measure had already qualified to be placed on the ballot for the March 7, 2000 primary election with over one million signatures, exceeding the requisite number for a constitutional amendment.²³ The court's description of the qualification process offers important insights into how the California initiative industry operates. The proponents

22. *Id.* at 971.

23. The California Constitution requires petitions signed by eight percent of the number of those who voted for governor in the last general election to qualify an initiative measure that amends the constitution. CAL. CONST. art. II, § 8(b). An initiative measure that enacts a statute requires petitions signed by five percent of the number of those who voted for governor in the last general election.

actually submitted five different versions of their proposal to the Secretary of State. All five measures contained a provision transferring reapportionment power from the legislature to the supreme court, but varied in terms of the additional constitutional amendments included. One version, entitled the "Anti-Corruption Act of 2000," would have included campaign financing reform; another version, entitled the "Governmental Reform Act of 2000," would have imposed a freeze on legislative salaries, rather than a reduction.²⁴ After measuring the level of public support for the various alternatives, the proponents informed the Secretary of State that only the legislative pay-cut version would be circulated for signatures, and the alternative versions would be withdrawn. The record included a newspaper quotation of the proponent's explanation for choice of the pay-cut version:

When you go to a mall—I sit there two hours a day—and ask people if they want to sign a petition to cut legislative salaries, they say, "where do I sign?" You say you've got a petition to set up a special master to redistrict—redistrict, not even reapportionment—they say, "what's that?"²⁵

Thus, Proposition 24 appears to be a classic example of "logrolling," whereby the proponents of a new reapportionment scheme were shopping around for other "sweeteners" to enhance the prospects of an electoral majority.

The court in *Jones* first addressed the propriety of pre-election review. The strongest argument in favor of pre-election review was the language of the single subject prohibition itself. The California Constitution provides that an initiative embracing more than one subject "may not be submitted to the voters."²⁶ But *Brosnahan I* was also a single subject challenge, and the court denied relief because "it is usually more appropriate to review constitutional and other challenges to ballot propositions or initiative measures after an election rather than to disrupt the electoral process by preventing the exercise of the people's franchise, *in the absence of some clear showing of invalidity.*"²⁷ Seizing upon this language, Chief Justice Ron George's majority opinion in

24. See *Senate v. Jones*, 21 Cal. 4th 1142, 1149 n.2 (1999).

25. *Id.* at 1151 n.5.

26. CAL. CONST. art. II, § 8(d).

27. *Brosnahan v. Eu*, 31 Cal. 3d 1, 4-5 (1982) (emphasis added).

Jones attempts to distinguish *Brosnahan I*. He cites the subsequent decision in *Brosnahan II*, which rejected the single subject challenge, as clear evidence "that a majority of the court in *Brosnahan I* was not persuaded that, in that instance, the challenged initiative violated the single subject rule."²⁸ This overlooks the fact that both cases were four to three decisions, and the majority which denied pre-election review in *Brosnahan I* was *not* the same majority that upheld Proposition 8 in *Brosnahan II*. Justice Broussard joined the *Brosnahan I* majority, but concurred in Justice Mosk's dissent in *Brosnahan II*, restating the objection that the single subject rule was violated.²⁹ Justice Newman dissented in *Brosnahan I*, then joined the majority in *Brosnahan II*, but never offered any explanation for either vote. Chief Justice George's analysis of the *Brosnahan* precedents also overlooks the shift in positions between *Brosnahan I* and *Brosnahan II*. In *Brosnahan I*, the single subject suggested by the initiative proponents was "public safety." In *Brosnahan II*, when the initiative was being defended by the Attorney General, the single subject became the protection of victims of crime.³⁰

The real explanation for rejecting *Brosnahan I* as precedent appears to be the subsequent limitation of the rule against pre-election review to challenges to the *substance* of initiative measures.³¹ This was precisely the position taken by Justice Stanley Mosk in his dissent to *Brosnahan I*. If the measure fails to comply with procedures required to qualify for the ballot, it should not be submitted to the voters.³² Chief Justice George concludes that delaying a decision against the validity of an initiative until *after* the election confuses and frustrates the voters, and "tends to denigrate the legitimate use of the initiative procedure."³³

28. *Jones*, 21 Cal. 4th at 1154.

29. See *Brosnahan v. Brown*, 32 Cal. 3d 236, 299 (1982) (Mosk, J., dissenting).

30. See *id.* at 273. (Bird, C.J., dissenting).

31. See *Jones*, 21 Cal. 4th at 1153 (citing *American Fed'n of Labor v. Eu*, 36 Cal. 3d 687 (1984); *Legislature v. Deukmejian*, 34 Cal. 3d 658 (1983)).

32. See *Brosnahan*, 31 Cal. 3d at 6-8.

33. *Jones*, 21 Cal. 4th at 1154. Dissenting Justice Joyce Kennard, joined by Justice Janice Rogers Brown, argues that "extraordinary circumstances" were presented in prior cases where pre-election review was permitted, and relies upon *Brosnahan v. Eu* for the proposition that the language of article II, section 8(d) of the California Constitution does not mandate pre-election review of single subject challenges. See *id.* at 1169 (Kennard, J., dissenting).

Turning to the merits of the single subject challenge, the majority articulates the same standard applied in *Brosnahan II*, that all of the parts must be "reasonably germane" to each other.³⁴ Conceding that this standard rarely leads to a finding that the rule was violated, the court found significant guidance in two recent decisions of the courts of appeal which struck down initiatives because they violated the single subject rule.

IV. REDEFINING THE SINGLE SUBJECT STANDARD

In *California Trial Lawyers Ass'n v. Eu*,³⁵ the Third District Court of Appeal, in a pre-election challenge, struck down an initiative entitled the "Insurance Cost Control Initiative of 1988." The measure, proposed by the insurance industry, combined a complex "no fault" insurance reform with a provision stating that no law restricting campaign contributions could be stricter or easier on insurance companies, consumer groups, or trade associations than on citizens as a whole. The court ruled that the campaign contribution provision was not reasonably germane to controlling the cost of insurance. It rejected the proponent's argument that regulation of the insurance industry was the single subject, finding an umbrella that encompassed any aspect of the business of insurance too broad. The court concluded this approach "would permit the joining of enactments so disparate as to render the constitutional single subject limitation nugatory."³⁶ The proponents then circulated a new version of the initiative without the offending provision. The measure was defeated in the November 1988 election.

In *Chemical Specialties Manufacturer's Ass'n v. Deukmejian*,³⁷ the court invalidated an initiative entitled the "Public's Right to Know Act," adopted as Proposition 105 in the November 1988 election. The measure mandated public disclosure of information related to (1) household toxic products, (2) seniors' health insurance, (3) nursing homes, (4) statewide initiative or referendum campaigns, and (5) sales of stock or securities for corporations doing business with South

34. See *Jones*, 21 Cal. 4th at 1157 (citing *Brosnahan*, 32 Cal. 3d at 245).

35. 245 Cal. Rptr. 916 (1988).

36. *Id.* at 921.

37. 278 Cal. Rptr. 128 (1991).

Africa. The court rejected the "single subject" of "public disclosure" or "truth in advertising" as so broad and general that it could justify the inclusion of an unlimited array of provisions and obliterate the single subject requirement.³⁸

Looking to these precedents, the supreme court in *Jones* defined the issue of compliance with the single subject requirement in terms of its underlying purposes, to prevent joinder of disparate measures for improper tactical purposes (i.e. "logrolling") and to minimize voter confusion and deception. The proponents of the "Let the Voters Decide Act of 2000" argued that, since both the legislative pay cut and the reapportionment scheme required that the voters approve of pay raises and reapportionment plans, "voter approval" was an appropriate single subject that united the measure. The court found this analogous to the "public disclosure" theme asserted in *Chemical Specialties*, which was "so broad that a virtually unlimited array of provisions could be considered germane thereto and joined in this proposition, essentially obliterating the constitutional requirement."³⁹ Alternatively, the proponents argued the legislative pay provisions and reapportionment provisions both dealt with combating the "self interest of individual legislators," by requiring voter approval. Here, the court seized upon the single subject rationale of avoiding voter confusion and deception, noting that under existing law, legislators do *not* control their own salaries, and thus, cannot "raise their own pay" as the initiative implied.⁴⁰

When the *Jones* court attempts to distinguish prior political reform initiatives that were upheld against single subject challenges, the opinion is much less persuasive. In *Fair Political Practices Commission v. Superior Court*,⁴¹ ("FPPC") the court upheld a massive reform of campaign contributions and other political practices and activities as all related to the common theme of reforming political practices. No explanation is offered as to why "political practices" is any narrower than "regulating the insurance industry" or "public disclosure" in terms of the potential to obliterate the single

38. See *id.* at 133.

39. *Jones*, 21 Cal. 4th at 1162 (quoting *Chemical Specialties Mfr's. Ass'n*, 278 Cal. Rptr. at 133).

40. See *id.* at 1163.

41. 25 Cal. 3d 33 (1979).

subject limitation. Furthermore, in *Legislature v. Eu*,⁴² the court rejected a single subject challenge to an initiative designed to impose term limits, reduce legislative expenditures, and limit legislative pensions based on the common theme of "incumbency reform," since all of these provisions would make "an extended career in public office both less available and less attractive to incumbent legislators."⁴³ An umbrella as large as "incumbency reform" seems to have just as much potential to render the single subject limitation nugatory as does "voter approval."

What really distinguishes *Jones* from both *FPFC* and *Eu* appears to be the element of "public understanding" of the underlying theme or unifying concept. While Chief Justice George never articulated this distinction, it appears to underlie his analysis of the single subject issue in *Jones*. The risks of confusion and manipulation which he identifies arise from the public's ability to perceive and understand some underlying relationship between reapportionment and legislative salaries, apart from the fact that they are presented in the same package for a vote. The underlying relationships asserted in *FPFC* and *Eu* were fully comprehensible to the electorate long before the initiatives in those cases were presented. With respect to *Brosnahan II*, however, a much closer question was presented. Professor Lowenstein, in formulating the test of public understanding, argued that Proposition 8 would actually have an easier time meeting the single subject standard under a public understanding test than under the unmodified "reasonably germane" test:

More clearly, the measure satisfies the "popular understanding" test because a substantial element of the population undoubtedly believes that criminal law should be restructured to better protect victims and potential victims; that this protection can be accomplished by making the law "tougher" on criminal defendants; and that the desired restructuring can be accomplished by the type of provisions contained in Proposition 8.⁴⁴

Reapportionment, on the other hand, is largely perceived by the public as a partisan political issue unrelated to legislative

42. 54 Cal. 3d 492 (1991).

43. *Id.* at 513.

44. Lowenstein, *supra* note 21, at 973.

salaries.

In 1992, the California Commission on Campaign Financing issued a comprehensive report on the California initiative process.⁴⁵ The report recommended retaining the "reasonably germane" standard to review initiatives for compliance with the single subject standard, and rejected Professor Lowenstein's "public understanding" test because of its "vagueness" and the burden it would impose on the courts to assess public understanding. It also suggested public understanding might be "manipulated" by initiative sponsors prior to placing a measure on the ballot.⁴⁶ The Commission then proceeded to suggest that a "conceptual coherence" test might be worthy of further study, calling for courts to look to three factors: (1) the likelihood of voter confusion; (2) the evidence of logrolling; and (3) conceptual coherence, which could be determined by "whether a 'reasonable voter' would have been 'surprised' to learn that the specific provisions being challenged were included in the initiative under question."⁴⁷ The first two factors have always been elements of the "reasonably germane" standard, and were key factors in the court's decision in *Jones*. The third factor, however, seems to be just another way of articulating the element of public understanding in terms slightly more objective than Professor Lowenstein's formulation.

Jones does not formulate a new standard for the courts to measure compliance with the single subject standard. But it does identify key elements that are likely to distinguish successful challenges from unsuccessful ones. First, the court will look to the alternative drafts and other evidence of "manipulation," which support a claim that "logrolling" is going on. Second, the court will examine the risks of public confusion and deception from a very broad perspective that closely approximates the "public understanding" test proposed by Professor Lowenstein. For most of the past half century, the "reasonably germane" standard has proven toothless. As the court demonstrated in *Jones*, however, "the rule is neither devoid of content nor as 'toothless' as some

45. CALIFORNIA COMMISSION ON CAMPAIGN FINANCING, DEMOCRACY BY INITIATIVE: SHAPING CALIFORNIA'S FOURTH BRANCH OF GOVERNMENT (1992) [hereinafter CCCF].

46. *See id.* at 319.

47. *Id.* at 320.

legal commentators have suggested.”⁴⁸ What gives it teeth, however, is the court’s willingness to look beyond the language of the initiative itself in addressing the single subject issue.

V. THE PROHIBITION OF CONSTITUTIONAL REVISION

The court in *Jones* did not reach the separate contention that Proposition 24 violated the prohibition against utilizing the initiative process to accomplish a constitutional “revision,” although the court noted the transfer of the power of reapportionment from the legislature to the supreme court would involve “a most fundamental and far-reaching change in the law.”⁴⁹ This limitation upon the power of the initiative has a pedigree that reaches back to the beginning of the last century, when the initiative power was first created. Just like the single subject rule, however, it has been rarely employed by the California Supreme Court to invalidate an initiative measure.

As Governor of California, Hiram Johnson led the 1911 reform movement that gave California the initiative. In defining the power of the initiative, however, an important distinction was made between amendment and revision of the constitution. Johnson’s measure provided that initiatives could only amend the constitution, reserving to a constitutional convention the power to revise it.⁵⁰

Hiram Johnson was well aware of the significance of this distinction. In 1893, the California Legislature approved a proposal to change the state constitution by declaring San Jose the new state capital. Before the proposal could be submitted to the electorate for a vote, however, a citizen of Sacramento filed a taxpayer’s suit challenging the validity of the measure. Grove L. Johnson, one of the smartest lawyers in Sacramento, was retained to take the case to the California Supreme Court. Johnson, assisted by his twenty-seven-year-old son and law partner, Hiram, devised a brilliant strategy.

The California Constitution provided two methods for substantive change: a convention of delegates to revise it, or a

48. *Senate v. Jones*, 21 Cal. 4th 1142, 1158 (1999) (citing Comment, *The California Initiative Process: The Demise of the Single Subject Rule*, 14 PAC. L.J. 1095 (1983); Comment, *Putting the “Single” Back in the Single Subject Rule: A Proposal for Initiative Reform in California*, 24 U.C. DAVIS L. REV. 879 (1991)).

49. *Id.* at 1142.

50. See CAL. CONST. art. XVIII, § 2.

proposal enacted by both houses of the legislature to amend it. The measure moving the capital, they argued, was a revision of the constitution because it created a special commission that had to obtain a cash contribution of one million dollars and locate ten acres of land before the change could take effect. Creating this external contingency went beyond the normal power of a mere "amendment." The supreme court agreed and the state capital remained in Sacramento.⁵¹

By preserving the exclusive power to revise the constitution for a constitutional convention, Hiram Johnson put a significant limitation on the potential scope of initiative measures. He recognized that initiative measures may not be drafted with the same degree of caution and circumspection that accompany a constitutional convention. In 1911, there were still many Californians around who remembered the careful debate and deliberation that surrounded the convention of 1878, which extensively revised the California Constitution. The debates were accurately recorded, providing exhaustive legislative history to decipher the intention of the drafters. The debates were also widely reported in the press, enhancing public awareness of the issues being decided.

Other states that adopted initiative reform devised a variety of creative safeguards to preserve their state constitutions from precipitous change. Nevada requires that its constitution cannot be amended by initiative unless the voters approve the initiative twice.⁵² Nevada passed a tax reform initiative similar to Proposition 13 in 1978, but two years later the voters thought less of the idea and defeated the measure. Six states with provisions for legislation to be enacted by popular initiative do not permit initiative measures to amend their state constitutions at all.⁵³

In 1962, the California Constitution was amended to extend the power to propose revisions of the constitution to the legislature.⁵⁴ This change was proposed by a Constitutional Revision Commission, which was engaged in a methodical effort to pare down the constitution's unwieldy

51. See *Livermore v. Waite*, 102 Cal. 113 (1894).

52. See NEV. CONST. art. XIX, § 4.

53. Alaska, Idaho, Maine, Utah, Washington, and Wyoming.

54. CAL. CONST. art. XVIII, § 1. See Bruce Sumner, *Constitution Revision by Commission in California*, 1 W. ST. L. REV. 48 (1972).

length and complexity. The rationale was that the hearings of the Commission and legislative debates would fulfill the same functions as a constitutional convention, and that the resulting proposals would be presented to the electorate clearly labeled as revisions.

Thus, the preclusion of constitutional revision by initiatives offers a powerful weapon to the courts to strike down initiative measures that are too ambitious in proposing constitutional change. The use of this weapon is hardly anti-democratic. The will of the people can be expressed with varying force. The adoption or revision of a constitution is widely perceived and appreciated as a very solemn expression of popular will. A commitment to the supremacy of the will of the people, however, leaves room for the imposition of procedural obstacles to insure that the people carefully distinguish their will from their whim.

Should a constitutional change that emerges from an initiative receive greater judicial deference than one that emanates from the legislature? The prohibition of constitutional revision is contained in the same constitution that proclaims that "[a]ll political power is inherent in the people" who enjoy the power to "alter or reform" government "when the public may require."⁵⁵

While this may seem at odds with the guarantee of a republican form of government which appears in the U.S. Constitution,⁵⁶ the federal guarantee has relevance only to an attack mounted under a provision of the federal Constitution.⁵⁷ As Professor Julian Eule put it, "Where the state constitution is the source of a judicial challenge, the absence of a representational bias and a different conceptualization of sovereignty render the argument inappropriate."⁵⁸ The California courts have hardly spoken with one voice on this point. Older cases suggest that initiative measures are entitled to no greater strength or

55. CAL. CONST. art. II, § 1.

56. U.S. CONST. art. IV, § 4.

57. In *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1912), the U.S. Supreme Court rejected a challenge to the initiative process itself under the federal constitutional guarantee of a republican form of government, holding it was a nonjusticiable "political" question.

58. Julian Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1548 (1990).

dignity than other legislation.⁵⁹ Justice Richardson, on the other hand, who authored *Brosnahan II*, argued that initiatives are entitled to "very special and very favored treatment."⁶⁰

It is here that I would part company with the late Professor Eule, at least with respect to the argument that an initiative is a revision rather than a mere amendment of the constitution. Eule suggested that "the strongest case for enhanced deference will occur in the states whose constitutions afford the voters the same direct and unimpeded access to the amendatory process that they allow for legislation."⁶¹ He then placed California in this category.

The full significance of the limitation on the power of the initiative now becomes apparent. It takes on added importance because of the more recent extension of the power to propose constitutional revision to the legislature. To say that a change in the constitution originated by initiative is entitled to greater deference than a change originated by the legislature, when the question is whether that change is a revision, turns the California Constitution on its head. The constitution itself recognizes the primacy of the legislature (and the constitutional convention) when it comes to changes substantial enough to be called "revisions." Thus, scrutiny of an initiative to determine whether it is a constitutional revision should not be tempered by deference to "the will of the people." Just like the federal constitutional guarantee of a republican form of government, the California Constitution recognizes a preference for representative democracy, in the form of a constitutional convention or a legislative enactment, when it comes to revision of the constitution.

On only two occasions has the California Supreme Court relied upon the constitutional revision prohibition to strike down an initiative measure. The first occasion was the 1948 decision in *McFadden v. Jordan*.⁶² The supreme court actually intervened three months prior to the November election to remove a 21,000 word monstrosity entitled the "California Bill of Rights" from the ballot. The measure was cooked up by Willis and Lawrence Allen, who were the

59. See *Wallace v. Zinman*, 200 Cal. 585, 593 (1927).

60. *Legislature v. Deukmejian*, 34 Cal. 3d 658, 683 (1983).

61. Eule, *supra* note 58, at 1548.

62. 32 Cal. 2d 330 (1948).

Howard Jarvis and Paul Gann of their generation. The Allen brothers were a combination of a little Thomas Jefferson with a lot of P.T. Barnum. Their "movement" was known as the "Ham and Eggs" movement. The only "rights" in their "Bill of Rights" initiative were the right of any organization to use a public school building for a meeting without paying a fee, and the right to fish in public waters. The rest of the measure included a complex retirement pension scheme, and plan for licensed gambling, a prohibition of taxes on oleomargarine, the establishment of a "Board of Naturopathic Examiners," regulation of strip mining, and some campaign reform measures.

There was no requirement at the time that initiative measures relate to a single subject. Concluding that the extensive changes the measure required in the California Constitution amounted to a "revision," the California Supreme Court emphasized that the difference between "amending" and "revising" was not just quantitative, but denoted a "field of application appropriate to its procedure." A constitutional convention was perceived as a "bulwark" against improvident or hasty change. The multifarious nature of the initiative was perceived as a transparent attempt to aggregate the support of a coalition of minority groups, the same sort of "logrolling" later addressed by the single subject rule:

The proposal is offered as a *single amendment*, but it obviously is multifarious. It does not give the people an opportunity to express approval or disapproval severally as to each major change suggested; rather does it, apparently, have the purpose of aggregating for the measure the favorable votes from electors of many suasions who, wanting strongly enough any one or more propositions offered, might grasp at that which they want, tacitly accepting the remainder. Minorities favoring each proposition severally might, thus aggregated, adopt all. Such an appeal might well be proper in voting on a *revised* constitution, proposed under the safeguards provided for such a procedure, but it goes beyond the legitimate scope of a single amendatory article.⁶³

The following November, California voters adopted an amendment to the state constitution proposed by the

63. *Id.* at 346.

legislature to add the single subject requirement for initiatives. Although motivated by the decision in *McFadden* enforcing the prohibition of constitutional revision, the single subject rule was broader, applying even to measures that propose only statutory changes. It remains clear, however, that the single subject rule and the prohibition of constitutional revision reflect some of the same concerns, particularly the aversion to "logrolling." Additionally, the prohibition of constitutional revision can apply even to measures that do address a single subject. A large number of changes to the constitution may be "reasonably germane" to each other, but still bring about such a fundamental change that they amount to a "revision."

The second case in which the California Supreme Court struck down an initiative measure as a constitutional revision was *Raven v. Deukmejian*.⁶⁴ While most of Proposition 115, a sweeping anti-crime initiative, was upheld, the court invalidated a key clause that would have required all procedural rights in the California Constitution to be construed in conformity with the decisions of the U.S. Supreme Court. In terms of its scope, the clause could only be compared with the legendary "omnibus repealer," in which the Arkansas legislature apocryphally enacted a clause providing, "All laws and parts of laws . . . are hereby repealed."⁶⁵ Section three of Proposition 115 would have added a clause to the California Constitution providing that, "This constitution shall not be construed by the courts to afford greater rights to criminal defendants than those afforded by the Constitution of the United States . . ." In striking down this provision as a constitutional revision, the California Supreme Court broke new ground. Conceding that the quantitative effects "seem no more extensive than those presented in prior cases,"⁶⁶ the court based its decision squarely on the qualitative impact, a fundamental restriction on judicial power which was described as "devastating."⁶⁷

The test propounded by Chief Justice Malcolm Lucas was

64. 52 Cal. 3d 336 (1990). In the interest of full disclosure, I must note that I was a named plaintiff in *Raven v. Deukmejian*, along with Robert Raven.

65. Note, *Legislative and Judicial Dynamism in Arkansas*: Poisson v. d'Avril, 22 ARK. L. REV. 724 (1969), reprinted in RODNEY R. JONES & GERALD F. UELMEN, SUPREME FOLLY 184 (1990).

66. *Raven*, 52 Cal. 3d at 351.

67. See *id.* at 353.

whether a measure makes a fundamental change in our preexisting governmental plan.⁶⁸ But defining a revision as a “fundamental” change simply substitutes one label for another, providing little guidance for future cases.

In defining “revision,” the supreme court should recognize that legislative or convention deliberation and debate hold several advantages over the initiative process as an instrument of change. Initiative measures provide no opportunity for amendments or corrections, leaving drafting gaffes to confound the courts. Initiative measures are presented to the electorate by special interests that are motivated to obfuscate the real issues behind a barrage of meaningless labels and slogans. These shortcomings become most important in the context of complex changes, which require ongoing interpretation and application.

All of these flaws were abundant in Proposition 115. The measure was drafted by a committee of prosecutors who sought no input from scholars or other experts on the criminal justice system. The “omnibus repealer” clause was poorly drafted and riddled with ambiguity regarding its reach. The measure was presented to the public in a media blitz of coat hangers and gas chambers. It is highly unlikely the public even understood its potential impact on the state constitution.

Thus conceived, the prohibition of constitutional revision by initiative preserves our commitment to rational discourse before we make important changes in how we govern ourselves. Rather than offering a label to merely restate a conclusion, the court should be asking whether the change the measure accomplishes is significant enough that the adversary deliberation of a legislative proposal or a constitutional convention is necessary.

If the prohibition of constitutional revision by initiative is perceived as a protection of rational discourse preceding changes with great impact, the legislative term limits imposed by Proposition 140 presented a close question—much closer than the decision in *Legislature v. Eu*⁶⁹ indicated.

In rejecting the argument that the term limits and drastic budget cuts imposed on the legislature were a constitutional revision, the majority opinion of Chief Justice

68. See *id.* at 355.

69. 54 Cal. 3d 492 (1991).

Malcolm Lucas relied on two principal arguments. First, he stressed that construing a limitation of *legislative* power to be a revision would insulate the legislature from “reform,” because only the legislature itself could initiate a “revision” to accomplish such reform. Second, he dismissed the long-term consequences of term limits as “simply unfathomable at this time.”⁷⁰

The first argument creates a double standard which permits more extensive “reform” of the legislature by initiative than would be permitted if the target were the executive or judicial branches. This simply ignores the structural protection for the legislative branch created by the constitution itself. Initially, the power to propose “revisions” was not even conferred on the legislature at all. Only a constitutional convention was empowered to initiate changes that amounted to a “revision.” The amendment that extended this power to the legislature was part of a careful plan to accomplish a redrafting and pruning of a constitution which had become unwieldy. It did not give the legislature any greater power to stymie reform, but expanded the available mechanisms to initiate reform while preserving the need for careful deliberation.

The conclusion that long-term consequences of the term limits and budget cuts were “unfathomable” defies reason. It suggests that if the effects of a fundamental change are immediate, it is more likely to be a revision than if the changes are like a time bomb, set to explode in the future. Courts are constantly engaged in a process of fathoming the future, every time they construe a statute or a constitutional provision. One did not need a crystal ball to assess the impact Proposition 140 would have on the balance of power between the executive and legislative branches of government. Because a governor and other executive officers have up to eight years in office, while the legislative leadership regularly turns over every two years, the significant shift of power that occurred was readily predictable.

To be sure, there were significant differences between the “omnibus repealer” clause struck down in Proposition 115, and the term limits upheld in Proposition 140. While there were drafting gaffes in both measures, the effect of the term

70. *Id.* at 510-11.

limits measures were clearly spelled out. The application of the measure did not require ongoing interpretation which would be aided by legislative history. On the other hand, the true impact of the measure on the balance of legislative and executive power was neither addressed nor assessed during the campaign that resulted in the adoption of Proposition 140.

The cynics among us will suggest that the most obvious difference is that the shift of power struck down in Proposition 115 was a shift of *judicial* power. The court is more likely to be protective of its own power than the power of the state legislature. All the more reason why we should insist that the principles underlying the distinction between amendments and revisions call for neutral application. Using a simple label like "fundamental" invites *ad hoc* result-oriented determinations that disguise, rather than expose, the underlying value judgments being made. Ultimately, the value we are seeking to uphold is the value of rational discourse before we make changes in our constitution with widespread impact. The test of what is a "revision" must include an assessment of what was lost in the elimination of that rational discourse by the use of the initiative process.

Applying this standard, it should be readily apparent that Proposition 24, by shifting the power to reapportion legislative and congressional districts to the California Supreme Court, would have violated the prohibition of constitutional revision as well as the single subject rule. The immersion of the supreme court in partisan politics would have had a devastating effect upon the independence of the court, and infected the process of appointing and confirming Justices of the court with all the worst elements of party politics. In my view, the constitutional infirmity of the initiative on this ground was even stronger than the claim that it violated the single subject rule. Apparently, one reason the court in *Jones* may have confined its analysis to the single subject challenge was that it felt it was on firmer ground in granting pre-election review on the single subject claim.

The Report and Recommendations of the California Commission on Campaign Financing include several changes in the prohibition of constitutional revisions by initiative. First, the Commission suggests that, since the legislature can propose constitutional revisions, there seems to be no reason

why the public should not be able to propose constitutional revisions. This, of course, ignores the value of the open legislative process over the secretive drafting of initiatives in creating a legislative history. The only context in which the legislature has ever exercised its power to propose constitutional revisions was in the context of the work of the Constitutional Revision Commission which motivated the granting of the power in the first place. The Commission also proposes a 5,000 word limit on initiatives, and a requirement of a super-majority of sixty percent or approval at two successive elections for initiatives to amend the constitution. While both of these proposals may have substantial merit, they do not really address the fundamental difference between constitutional revision and other amendments to the constitution.

VI. PRE-ELECTION REVIEW

The greatest impact of *Jones* may ultimately be in cracking open the door to pre-election review of initiatives. How wide should the opening be? The standard enunciated in *Brosnahan I*, that pre-election review is precluded absent a "clear showing of invalidity,"⁷¹ has clearly been abandoned. The court in *Jones* concluded: "[W]hen a court determines that the challengers to an initiative measure have demonstrated that there is a *strong likelihood* that the initiative violates the single subject rule, it is appropriate to resolve the single subject challenge prior to the election."⁷² A "strong likelihood" is less than a "clear showing," but it is certainly reasonable to ask why there should be any difference at all between the standard of proof applied in pre-election and post-election challenges. If a presumptive threshold is to be overcome, should not it be higher after the voters have already indicated their approval of a measure? Regardless of how the burden of proof is defined, it is clear that judges are very reluctant to invalidate an initiative after the voters have approved it—probably more reluctant than they might be in a pre-election challenge. Unlike the situation in which a court is assessing the appropriateness of a preliminary injunction based on the likelihood of a party prevailing on the merits, the court deciding a pre-election

71. *Brosnahan v. Eu*, 31 Cal. 3d 1, 4 (1982).

72. *Senate v. Jones*, 21 Cal. 4th 1142, 1154 (1999) (emphasis added).

challenge will decide whether a “strong likelihood” of a violation exists at the same time that it decides that a violation has or has not occurred. If a pre-election challenge is rejected because there is no “strong likelihood” of success, can it really be imagined that a post-election challenge will succeed? Would it not make more sense to simply decide the pre-election challenge on the merits, and then preclude post-election review of the question altogether? One commentator, noting that most states preclude post-election procedural attacks altogether, or impose a *higher* burden of proof on post-election challenges, has suggested that post-election review of procedural challenges should be precluded altogether in California, in the absence of a showing that a pre-election challenge was impossible, impracticable or otherwise futile.⁷³ While I would not go that far, I fail to see any logical basis or practical value for the “strong likelihood” prerequisite to pre-election challenges. In reality, it operates as the standard for *any* procedural challenge, substantially diluting the protection afforded by the single subject rule and the prohibition of constitutional revision.

Jones actually limited its “strong likelihood” standard to single subject challenges, leaving open the possibility that the higher “clear showing” standard might still be applied to challenges based on the prohibition of constitutional revision. There does not appear to be any reason to place greater limits on pre-election constitutional revision challenges than are imposed on single subject challenges, other than potential severability. A successful constitutional revision challenge may only knock out a severable portion of an initiative measure.⁷⁴ A single subject violation, on the other hand, requires complete rejection of the entire measure⁷⁵ because the constitutional prohibition provides, “An initiative measure embracing more than one subject may not . . . have any effect.”⁷⁶

In noting the decisions subsequent to *Brosnahan I* that had permitted pre-election review of procedural issues, the

73. See Howard Eastman, *Squelching Vox Populi: Judicial Review of the Initiative in California*, 25 SANTA CLARA L. REV. 529, 552 (1985).

74. See, e.g., *Raven v. Deukmejian*, 52 Cal. 3d 336 (1990) (upholding the bulk of Proposition 115 while invalidating the “omnibus repealer” as a constitutional revision).

75. See *Jones*, 21 Cal. 4th at 1142.

76. CAL. CONST. art. II, § 8(d).

court in *Jones* concluded that the general rule against pre-election review "does not preclude preelection review when the challenge is based upon a claim, for example, that the proposed measure may not properly be submitted to the voters because . . . it amounts to a constitutional revision rather than an amendment."⁷⁷ The court cited to *McFadden v. Jordan*,⁷⁸ which invalidated the "Ham and Eggs" initiative as a constitutional revision in a pre-election challenge. Although the *Jones* court was careful to note that *McFadden* found that the measure *in its entirety* was a constitutional revision, the availability of severance of a constitutional revision can be addressed in a pre-election challenge just as effectively as in a post-election challenge. In fact, pre-election severance would be preferable, since it would eliminate any doubts that some voters may have voted for the initiative only because it *included* the invalid constitutional revision.

Both single subject challenges and claims of constitutional revision can be expeditiously litigated with very little evidence. The main focus for either claim is on the language of the initiative itself. Even if Professor Lowenstein's "public understanding" test gains further ground, the evidence can be submitted in declarations, and much of it might even be judicially noticed. The similarity of the issues raised under both claims suggests judicial efficiency would be enhanced if single subject and constitutional revision challenges were combined in one proceeding.

The advantages and disadvantages of pre-election versus post-election review of initiatives have been thoroughly analyzed elsewhere.⁷⁹ The greatest obstacle to expanded availability of pre-election review, however, will be the problem of judicial resources. In her dissent in *Jones*, Justice Joyce Kennard decried the "extraordinary" rush to decision which required expedited briefing (two weeks) and allowed only three court days between oral argument and the filing of the decision.⁸⁰ Chief Justice Ron George responded in a footnote, asserting: "[T]his court historically has demonstrated its ability and willingness to resolve matters

77. *Jones*, 21 Cal. 4th at 1153.

78. 32 Cal. 2d 330 (1948).

79. See Douglas C. Michael, *Pre-election Judicial Review: Taking the Initiative in Voter Protection*, 71 CAL. L. REV. 1216 (1983).

80. See *Jones*, 21 Cal. 4th at 1169 (Kennard, J., dissenting).

expeditiously when circumstances so require, without compromise to the deliberative process, both in election and nonelection matters.⁸¹ Even at the highest levels, however, expeditious review may not always produce soundly reasoned opinions.⁸² If the California Supreme Court had to muster the kind of performance it delivered in *Jones* several times each year, the court might encounter serious difficulties in keeping up with its normal caseload. *Jones* was only the sixth case in fifty years in which the California Supreme Court granted pre-election review of an initiative measure.⁸³ If pre-election challenges are freely permitted to assert any plausible claims that a measure violates the single subject rule or the prohibition of constitutional revision, the California Supreme Court could easily have five or six expedited cases on its docket every year to resolve these issues. But that would occur only if the supreme court insisted on hearing all of these cases itself. There is no reason why many of these claims could not be resolved in the intermediate courts of appeal. One of the recent court of appeals decisions which the *Jones* court looked to for "important guidance," in fact, was the pre-election challenge invalidating the "Insurance Cost Control Initiative of 1988."⁸⁴ The parties could present expedited petitions for review of the court of appeals decision to the supreme court, which could then either deny a hearing, resolving the matter, or vacate the court of appeals ruling and reserve the question for post-election resolution. Relief might also be afforded by moving the deadlines for qualification of an initiative for the ballot, to give the courts more time to hear pre-election challenges.

In Florida, pre-election review for compliance with the single subject requirement is required once an initiative has gathered ten percent of the signatures necessary to place it on

81. *Id.* at 1156 n.10 (citations omitted).

82. *See, e.g.,* *Bush v. Gore*, 531 U.S. 98 (2000).

83. Previous cases were *McFadden v. Jordan*, 32 Cal. 2d 330 (1948); *Perry v. Jordan*, 34 Cal. 2d 87 (1949) (pre-election decision rejecting single subject challenge); *Assembly v. Deukmejian*, 30 Cal. 3d 638 (1982) (pre-election challenge to referendum on reapportionment statutes); *Legislature v. Deukmejian*, 34 Cal. 3d 658 (1983) (pre-election challenge invalidating initiative allowing second legislative redistricting in ten year period); and *American Federation of Labor v. Eu*, 36 Cal. 3d 697 (1984) (pre-election challenge invalidating initiative which violated federal constitution).

84. *California Trial Lawyers Ass'n v. Eu*, 245 Cal. Rptr. 916 (1988).

the ballot.⁸⁵ One California proposal would require the Attorney General to review proposed initiatives to determine if there is "substantial doubt" whether they comply with the single subject requirement or constitute a revision of the constitution. If the measure subsequently qualifies for the ballot, the Attorney General would be required to file a pre-election challenge in the supreme court.⁸⁶ Doubtless there are many other innovations which could be considered to alleviate any overload that broader availability of pre-election challenges might create.

Press reports in the wake of *Jones* suggest that the number of pre-election challenges to initiatives has already increased.⁸⁷ The crack in the door may attract a parade of petitioners, but the fact that lots of petitioners have a valid claim for relief should never be viewed as justification for courts to close their doors. Even five or six pre-election challenges a year will hardly overwhelm the California court system. But five or six initiatives every election that violate the single subject rule or revise the constitution could very well overwhelm California's voters. The growing complexity of the California ballot may be a strong factor in the disappointing decline in voter turnout in California elections.

VII. CONCLUSION

The California Supreme Court decision in *Jones* should send a strong message to the industry that drafts and promotes initiative measures as California's "fourth branch" of government. The door has been opened to greater use of pre-election review of procedural challenges to initiatives, lowering the threshold from the previously required "clear showing" of invalidity to a "strong likelihood" of invalidity. The requirement that initiatives embrace a single subject has finally grown some teeth because of the court's willingness to look beyond the language of the initiative itself to extraneous evidence of "logrolling," and due to the analysis of the potential for voter confusion or deception that closely resembles the "public understanding" test proposed by

85. See CCCF, *supra* note 45, at 322.

86. See Michael, *supra* note 79, at 1234, 1237. If the pre-election challenge was unsuccessful, however, this could create a conflict that would disqualify the Attorney General from defending the initiative after its enactment.

87. See Tyler Cunningham, *More Initiatives Facing Dicey Pre-Election Legal Battles*, S.F. DAILY J., Nov. 7, 2000, at 1.

Professor Daniel Lowenstein. The breadth of the “theme” used to unite disparate measures will be closely assessed in terms of its potential to render the single subject limitation wholly nugatory.

While *Jones* avoided the question of whether the initiative at issue was a constitutional revision, there are compelling reasons to give this question the same access to pre-election review as the single subject question, and to enforce it with similar vigor.

These changes should be welcomed as supportive of California’s embrace of direct democracy. The growing complexity of initiatives and the swelling ambition of their proponents actually threaten continued public support for the initiative process, lower the level of public participation in elections, and inject confusion and deception into our political discourse. Greater utilization of pre-election review will also enhance the independence of the California judiciary, by eliminating the perception that judicial enforcement of the constitution contradicts the expressed “will of the people.”
